

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2009 Session

RANDY J. MANESS, JR. ET AL. v. KURT S. GARBES ET AL.

Appeal from the Circuit Court for Sumner County
No. 28723-C C. L. Rogers, Judge

No. M2008-00797-COA-R3-CV - Filed March 26, 2009

The trial court dismissed this negligence action as being time barred due to the plaintiffs' failure to issue alias summons within one year after the issuance of the original summons. The plaintiffs contend the trial court erroneously failed to consider whether the delay in issuance of the alias summons was the result of excusable neglect. This action arose from an automobile accident that occurred on July 9, 2005. The action was timely filed on July 7, 2006, and summons were issued the same day; however, they were never served. On June 4, 2007, the plaintiffs mailed alias summons to the Circuit Court Clerk's office requesting that they be issued and served on the defendants, but the Clerk did not receive this envelope until four months later, on October 10, 2007. As requested, the clerk issued alias summons on October 10, 2007, and they were served on the defendants on November 6, 2007. The defendants then filed a motion to dismiss contending the action was time barred. The trial court granted the motion. This appeal followed. Finding no error, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Carthel L. Smith, Jr., Lexington, Tennessee, for the appellants, Randy J. Maness, Jr., and Catherine Maness.

William L. Moore, Jr., Gallatin, Tennessee, for the appellees, Kurt S. Garbes and Darrell L. Garbes.

OPINION

Randy J. Maness, Jr., and his wife, Catherine Maness (the "plaintiffs"), timely filed this negligence action against Kurt S. Garbes and Darrell L. Garbes (the "defendants") on July 7, 2006, for injuries sustained in an automobile accident that occurred on July 9, 2005.¹ Summons were issued on the same day, but the defendants were never served.

¹The Complaint also set forth the personal injury claims of the plaintiffs' minor son, Jeremy Hunter Maness.

Within a few months after the Complaint was filed, the plaintiffs and their initial attorney parted ways.² Thereafter, the plaintiffs retained Carthel Smith to represent them in this action. On June 4, 2007, Mr. Smith mailed a Notice of Appearance along with alias summons to the Office of the Circuit Court Clerk along with a letter requesting the alias summons be issued. The envelope containing the Notice of Appearance and alias summons was not received by the clerk until October 10, 2007.³ As the plaintiffs had requested, the clerk immediately issued the alias summons. The defendants were served via certified mail on November 6, 2007.⁴

The defendants timely filed a motion to dismiss on the basis the plaintiffs' claims were barred by the statute of limitations. The trial court granted the motion and an Order of Dismissal was filed on March 17, 2008, dismissing the plaintiffs' claims with prejudice.⁵ This appeal followed.

ANALYSIS

The plaintiffs concede that the alias summons were not issued timely and their claims are barred by the statute of limitations unless it is determined that the delay was the result of excusable neglect.

The statute of limitations for the plaintiffs' personal injury claims against the defendants is one year. *See* Tenn. Code Ann. § 28-3-104(a). The plaintiffs' claims accrued on July 9, 2005, the day of the automobile accident. The Tennessee Rules of Civil Procedure provide the following:

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, *regardless of the reason*, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations *unless* the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

Tenn. R. Civ. P. 3 (emphasis added).

²The record does not indicate when the plaintiffs' initial counsel withdrew or when Mr. Smith was retained.

³The date on the return receipt indicates the Notice of Appearance and alias summons were received by the Clerk's office on October 10, 2007.

⁴Alias summons were issued on October 19, 2007. The first attempt at service was returned undelivered on October 29, 2007, with the notation "forward time expired." The defendants were served on the second attempt via certified mail on November 6, 2007.

⁵Because the plaintiffs' son is a minor, the trial court correctly denied the defendants' motion to dismiss the claims of the minor plaintiff. Accordingly, the claims by the plaintiffs' minor son survived and are not at issue on appeal.

The plaintiffs' complaint was timely filed on July 7, 2006, and process for each defendant was promptly issued. Neither defendant, however, was served within 90 days after issuance of the initial process, and the plaintiffs did not obtain issuance of new process within one year after issuance of the previous process as required pursuant to Tenn. R. Civ. P. 3. Therefore, the plaintiffs may not rely upon the July 7, 2006 filing of the complaint to toll the running of the statute of limitations unless the period within which to issue new process is expanded pursuant to Tenn. R. Civ. P. 6.02 on the ground their failure to act within the proscribed time period was the result of excusable neglect.

The plaintiffs' excusable neglect argument is based upon the fact their attorney prepared alias summons for each defendant and timely mailed the summons to the clerk's office on June 4, 2007, requesting the clerk issue the alias summons for service on the defendants. It is undisputed that the attorney mailed the summons on June 4, 2007, that the correspondence was "lost and/or delayed" after their attorney placed it in the mail, and that the clerk did not receive the alias summons in the mail until after the year had expired. The plaintiffs insist this delay was not their fault because the mail delivery was beyond their control after the envelope was mailed.

Tennessee Rule of Civil Procedure 6.02 provides:

When by statute or by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done, where the failure to act was the result of excusable neglect, but it may not extend the time for taking any action under Rules 50.02, 59.01, 59.03 or 59.04, except to the extent and under the conditions stated in those rules. This subsection shall not apply to the time provided in Tennessee Rule of Appellate Procedure 4(a) for filing a notice of appeal, nor to the time provided in Tennessee Rule of Appellate Procedure 24(b) and (c) for filing a transcript or statement of evidence.

The rule permits the trial court to enlarge the period "with or without motion or notice" if request is made *before* the expiration of the period. Tenn. R. Civ. P. 6.02. No such request was made before the expiration of the period at issue. The rule also permits the trial court to enlarge the period "upon motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect, . . ." except as limited by specified rules. *Id.* The plaintiffs did not file a motion with the trial court requesting relief under Rule 6.02. Generally, when a party fails to seek available relief from the trial court, the issue is deemed waived on appeal. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996); *see also Norton v. McCaskill*, 12 S.W.3d 789, 795 (Tenn. 2000).

The plaintiffs, however, did file a Response to Motion to Dismiss, which could be construed as containing a prayer for relief under Rule 6.02. To the extent the Response can be construed as

requesting relief under Rule 6.02, it is also reasonable to construe the trial court's grant of the defendants' motion to dismiss as being based in part upon a determination that the plaintiffs' failure to obtain issuance of summons within the time period proscribed by Rule 3 was not the result of excusable neglect.

Rule 6.02 expressly states that the decision to grant or deny an enlargement of time due to excusable neglect is within the *discretion* of the trial court; therefore, our review of the trial court's decision is subject to the very deferential abuse of discretion standard, which does not permit this court to substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)). Pursuant to the abuse of discretion standard, the trial court's ruling will be upheld "so long as reasonable minds can disagree as to propriety of the decision made." *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000)). A trial court abuses its discretion if it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Id.* (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). We find no basis upon which to conclude that the trial court abused its discretion by not retroactively expanding the period of time in which to issue new process. Accordingly, we affirm the trial court's dismissal of the plaintiffs' action on the ground that the plaintiffs failed to commence the action within the applicable statute of limitations.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the plaintiffs, Randy J. Maness, Jr., and Catherine Maness.

FRANK G. CLEMENT, JR., JUDGE